

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



ORIGINAL

75-7382

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United States Court of Appeals  
FOR THE SECOND CIRCUIT

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YAWATA IRON & STEEL CO., LTD.,

*Plaintiff-Appellant,*  
*against*

ANTHONY SHIPPING CO., LTD.,

*Defendant-Appellee.*

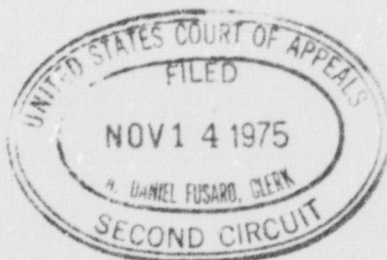
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BRIEF FOR DEFENDANT-APPELLEE

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## BRIEF FOR DEFENDANT-APPELLEE

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### Statement

This is an appeal from the decision of an experienced judge who, after finding a preponderance of evidence supported the defense, applied the controlling statute and dismissed the complaint. Although appellant's brief claims legal error and is well larded with citations, it is essentially a plea that this court reach a different conclusion on the factual evidence.

The sequence of events has been recited in the opinion, and again in appellant's brief; no useful purpose would be served by further repetition. We can, however, summarize the strengths of the defense which appellant has understandably avoided—strengths which lead to the same result even before application of the “clearly erroneous” rule of *McAllister v. United States*, 348 U.S. 19.

### POINT I

**Due diligence was exercised to make the ship seaworthy prior to the commencement of the voyage and she was seaworthy at that time.**

A ship filled with water and sinking is, at that time, unseaworthy. The critical point of inquiry is her condition when putting to sea. Appellant's review begins over one year before the voyage took place, but if history has relevance we should start six years earlier, when the ship was built.

The “Antonios Demades” was one of a group of nine bulk carriers of unusually rugged construction (289a, 337a). All were built and tested to meet the rigid standards of the

American Bureau of Shipping (ABS), a worldwide classification society of unsurpassed excellence, whose representatives were in attendance from the beginning of construction (182a-183a). The "Antonios" and her sister ships were thereafter subjected to the periodic special surveys, annual drydock surveys, load line surveys, etc., which have been found to be both necessary and sufficient to meet the requirements of due diligence. In pretrial discovery proceedings, every plan, every test, and every report was produced by ABS and made available to appellant.

Included in those documents were the survey reports dealing with repairs at Osaka, Japan, one year before the voyage in question. These reports are significant because they cover the annual inspection, the last prior drydocking, and repair of damage from a Caribbean grounding which appellant now stresses. We did not rely solely on the survey reports, the repair bills, or her classification certificates (which were the highest) even though all of these documents were produced, and attest to the ship's good condition. We relied primarily on the unbiased testimony of Omachi, the American Bureau surveyor with over twelve years' experience at that time, who actively supervised the repairs. During the month long repair period, he was on board every day for several hours, listed every damage to be found, dictated the necessary repairs, inspected each job as completed, and supervised the testing. He confirmed the contents of his reports which detailed the work done, and which were published with a final certification that, "all above recommendations were carried out at this time, examined and found satisfactory." The repair bills attest to the completeness of the repairs\* (Ex. 28-31). After reviewing all this evidence, appellant's expert, Gilbert, saw no reason to believe that Omachi had

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\* Appellant's surveyor estimated the repairs would have cost \$1.5 million in an American yard (T.M. 269).



not corrected all damage, or that his certification was incorrect (T.M. 277, 180a).

But any Monday morning quarterback can find something to criticize. Appellant joins the group by saying we should have produced the owner's marine superintendent. Had we done so, one can confidently predict an attempted impeachment for bias. But the trial court concentrated on the condition of the ship—not the availability of witnesses—and found:

“ . . . there was no evidence to suggest that the repairs were inadequate. Significantly, if the repairs were done properly, plaintiff's expert naval architect, John Gilbert, testified that the hatch covers and coamings would have been restored to their original strength. The independent surveyor in Japan indicated in his report and in his deposition that the repairs were done properly.” (27a)

This was in response to appellant's stressing of prior damage to the hatch covers. Omachi had ordered the covers removed and repaired, the chains re-adjusted, the coaming aligned to make a tight fit, and a hose test upon completion to insure water tight integrity (Ex. 26, 353a). The repair bills show that the distortion to the coamings was minor (362a-363a). Nevertheless, it was repaired and Omachi described what was done to the covers.

“Q. Just exactly what was done to the hatch covers?

A. Some hatch cover panels were brought to the ship and faired and refitted and also small repairs were done.

Q. Then after that work was done in the shop what was done with the hatch covers?

A. Then they were tested and tried for tightness.

Q. Were they brought back to the ship?

A. Yes.

Q. And then did you supervise some testing to see if they fit properly?

A. Yes.

Q. And after all that testing was there a hose test too?

A. Yes.

Q. And as a result of all that testing, were you satisfied they were in good seaworthy condition?

A. Yes." (324a-325a)

There was the same careful attention in all areas. Omachi went into the cargo holds and examined the bulkheads, inspected the outer hull in drydock, surveyed the machinery, and listed every defect to be found (316a-327a). All were corrected.

In addition, Omachi performed the annual Load Line Inspection which is particularly concerned with openings where water might enter, such as hatches, doors, vent pipes, etc. (T. 23, p. 9). The details of this special inspection are recorded in Exhibit A (490a), and the load line certificates which attest to the continued compliance with this rigid inspection are Exs. 58, 59 and BB. Omachi testified that if there had been an alteration in any watertight opening, he would have made a special report (337a, Ex. C), but there was no report because no changes were made. Independent surveyors inspected the ship at later dates and found her free of significant damage. Two of these surveys were performed just before the final voyage; two more were conducted three months earlier (Exs. F, G, K, B, D). In addition, the bo'sun, whose duty it was to supervise the opening and closing of the hatches, testified to the continuing good condition which he encountered on his daily inspection trips (431a-439a). The officer in charge of this area, the chief officer, did not survive.

In summary, numerous witnesses were able to verify a good seaworthy condition, particularly in the hatch area now under attack. Due diligence demands nothing more.

In the *Margarine Verkaufsunion v. G. C. Brovig* (SDNY, 1970), 318 F.S. 977, the ship had been inspected by the

classification surveyor nine (9) months before the voyage in suit. The court held this to be adequate, saying:

"In September, 1963, nine months before the voyage in suit, the BROVIG was drydocked for her annual required inspection at Antwerp. A Lloyd's surveyor inspected the vessel's sides, decks, bottom and rudder. He performed the usual tests for hull seaworthiness, making a visual examination of all plates to see if they were corroded, fractured or had leaking rivets, and hammer tested those plates that showed signs of corrosion, which did not include the No. 5 port wing tank. In terms of his experience, which was considerable and impressive, the Lloyd's surveyor was of the view that the tests applied were adequate to reveal whether or not anything was wrong with the plates; that in fact they were in good condition; and that the vessel was seaworthy. Lloyd's, based upon the surveyor's recommendation, continued the BROVIG in class and issued the appropriate certificate. The ship's master, who was present during the inspection, was also of the view that the ship was 'completely seaworthy.' The examination and testing of the vessel by Lloyd's competent and experienced surveyor constituted due diligence to make the vessel and her tanks seaworthy, and nothing that occurred thereafter until the time she set sail from Houston and New Orleans requires any different finding (citing cases)."

(p. 981)

\* \* \*

"Upon all the evidence, the defendants' expert's opinion is the only reasonable explanation for the fracture.

"The crucial question on the issue of latent defect is whether it could have been discovered by due diligence before the event—essentially, whether it was discoverable by any reasonable and customary test or inspection before the BROVIG set sail for Rotterdam.



Since the plate was already in the vessel, it was not possible to give it a physical or chemical test for brittleness. Nothing about the condition of the plate prior to her sailing suggested, in common experience, any of the tests which plaintiff, with hindsight judgment, urges should have been used."

(p. 982)

In *J. Gerber & Co. v. S.S. Sabine Howaldt*, 437 F. 2d 580 (2nd Cir. 1971), the Lloyd's surveyor made his inspection eight months before the voyage in suit. See also *The Floridian*, 83 F. 2d 949 (2nd Cir. 1936); *Balfour, Guthrie & Co., Limited v. American-West African Line, Inc.*, 136 F. 2d 320 (2nd Cir. 1948).

Even where the specific cause of loss is never ascertained the duty of care remains reasonable. In *Peter Paul Inc. v. Rederi A/B Pulp* (CA 2, 1958) 258 F. 2d 901, the entire forward half of a ship broke off as she was proceeding into heavy seas off Japan. This court reasserted that only normal precautions were required, saying:

"In our opinion it is not necessary and virtually impossible to state with any degree of certainty what actually caused the fracture.

"On this phase of the case, all the ship owner need establish is that normal precautions were taken to see that a discoverable notch did not exist. Appellants rely on the fact that there is no affirmative proof that such a defect was not present when the ship left Yokohama. However, if positive evidence were required to establish a negative proposition of fact (here absence of a discoverable defect), no carrier could ever discharge its statutory burden of proof. A month prior to the fracture a third party, Lloyd's ship surveyor at the Hong Kong drydock, inspected the shell and found it to be in good condition. This



party was qualified to make the inspection and the inspection was made in the regular course of his business. Unless there is some evidence of bias, incompetence or fraud, the report (Exh. NN) must be accepted at its face value. Appellants have stipulated that the Hong Kong surveyor would have testified in accordance with this report (Exh. A)."

(p. 905-906)

In simple terms, "Due diligence means doing everything reasonable, not everything possible. The term is practically synonymous with reasonable or ordinary care." *The Hamildoc* (Kings Bench Appeal, Canada) 1950 A. M. C. 1973, 1985.

Despite the mass of evidence confirming the good condition of the ship and of the hatch area in particular, appellant continues to infer that a prior grounding had fatally weakened the hatch. Although its expert architect, Gilbert, had never seen a ship aground and had only minimal exposure to large vessels, he did not hesitate to speculate as to its possible effect (T.M. 223-4). And speculation is the correct word. The entire record is devoid of any opinion by Gilbert as to the cause of the sinking. It is little wonder that the trial court reached a conclusion that:

"... there was no evidence to suggest that the repairs were inadequate. Significantly, if the repairs were done properly, plaintiff's expert naval architect, John Gilbert, testified that the hatch covers and coamings would have been restored to their original strength. The independent surveyor in Japan indicated in his reports and in his deposition that the repairs were done properly."

(27a)

Gilbert's logic was that if hull deformation had occurred, a transit would be required to find it; a transit was

not used, ergo, the hull was deformed. The trial court addressed itself directly to this allegation:

"... the fact that a transit was not used does not establish that there was unrepaired hull deformation. However, even if there were locked-in stresses at the time the ship left the shipyard, there was testimony by defendant's expert naval architect, Ganly, that these stresses would have been immediately noticable or would have worked themselves out over time as the ship sailed the seas."

(30a)

\* \* \*

"... the failure to use a transit in Japan had no relevance to the seaworthiness of this vessel when it departed on this voyage because at that time there were no unacceptable locked-in stresses."

(42a)

There was also proof of continuing attention and care after the ship left the repair yard. The hatches would have to be opened and closed many times on each voyage, and they were continually exposed to seas and rain, the entrance of which would have caused serious damage to cargo. The bo'sun testified, and the court found:

"The ship's crew checked the hatches daily (weather permitting) and no problems with the No. 1 hatch were encountered."

(40a)

In summary, there was overwhelming proof of due diligence from the day the keel was laid until the final voyage, and the trial court properly concluded:

"... although the failure of No. 1 hold hatch cover was unexplained, plaintiff has not established that it was due to improper repairs of prior damage or unauthorized structural modification."

(28a)

## POINT II

**The trial court correctly held that the sinking was due to an error in management or navigation—an excepted cause under COGSA.**

It is undisputed that even with No. 1 hold completely filled with water, the ship still had positive buoyancy and would have remained afloat. After the seas stove in the hatch covers, the master reversed course and sailed downwind to determine the extent of damage. Having established that it was apparently limited to No. 1 hold, he headed back into the storm, supremely confident that his ship was entirely safe. He failed to take one important fact into account. Although the flooding of No. 1 had a relatively small effect on the overall buoyancy, its forward location gave it strong leverage and caused the bow to sink 8.5 feet deeper into the water (T.M. 270). As the oncoming seas continued to crash aboard, they struck structural parts of the ship which had never been designed to resist such forces.\*

The result, as Ganly, the expert architect and surveyor, explained, was that one compartment after another would be breached as the pipes, vent shafts, and other deck openings to these spaces were exposed to forces they had never been intended to meet. This was also true of the internal bulkheads between the holds. They had been built to withstand a full head of static water pressure—not major wave action abetted by swirling pieces of heavy steel scrap. Exactly how the seas broke into one space after another will never be known. It occurred during the night, and the best evidence is at the bottom of the Pacific. But under such circumstances, judgment is made on the basis of the

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\* This is not an error in construction; ships are designed for normal usage. As a clear example, the plates of the bridge superstructure are never as strong as those in the hull or main deck.



known facts and expert opinions. That is what the trial court did. It found,

“the opinion of defendant’s naval architect, Ganly, as the most credible explanation of how the ship sunk” (21a).

Thus, the master’s error was the proximate cause of the ship’s loss. Both Ganly and Gilbert agreed that the progressive flooding would have occurred more slowly if the ship had been headed down wind. Referring directly to the testimony of the former, the court said:

“ . . . Ganly was correct in saying that there would have been a good chance that the ship would not have sunk had the master not decided to sail back into the force of the storm.” (23a)

The trial court noted the diminishing storm and concluded:

“This difference probably would have been crucial.” (23a)

Appellant tries to avoid the effect of the master’s error in judgment by inferring—as it did on the trial—that a shortage of fuel prompted the decision to resume course. It is a claim which withered under the mass of contradictory evidence—evidence which should have been brought to the attention of this court. To determine the fuel on board it was not necessary to produce the chief engineer (no longer employed and living in Greece in retirement); the fuel was a matter of record. It was appellant who placed in evidence—and the trial court relied on—records made when the ship bunkered at the Panama Canal, plus weekly radio reports from the ship showing quantities, consumption, speed, and other related data (Exs. 32, 24, 35, 36, 370a-372a, 25a). Thus, the experts were able to calculate exactly how much fuel was on board, and the

trial court was able to find that the ship had ample bunkers, plus "a reserve fuel supply of about 25% when it sailed from Balboa" (26a).

It is presumptuous to challenge these actual figures with conjectures of shortage based solely on the act of a prudent master in checking his bunker consumption when faced with an entirely new prospect, i.e., forging into heavy seas with a partially flooded ship. It is ridiculous to contend that diesel oil could not be counted in these estimates. The only propulsion unit the ship had was a diesel engine (289a)!

Another weak argument is based on the third engineer's testimony that at some time before the ship began to sink, he went into the engine room and saw the pumps working on No. 2 and 3 holds and double bottoms. That pumping did not necessarily mean these compartments were already flooded; actual knowledge of flooding in No. 1 would cause any prudent person to pump the adjacent spaces as a safeguard.

### POINT III

**Appellant tried to prove specific fault, but failed in the attempt.**

Although the complaint alleges the usual cargo bailment, that is not the case that was presented to the trial court. In the pre-trial order, plaintiff alleged ten specific faults (261a-262a). At the trial, appellant's counsel went through 292 pages of testimony and offered over 60 exhibits before he rested. Having undertaken to prove the ship unseaworthy, appellant cannot now complain (incorrectly) that the vessel owner failed to disprove it.

The approach was apparently tacit admission that the pre-trial deposition testimony *did* establish due diligence, which required plaintiff to come forward with proof of actual fault. In any event, appellant's proof was offered,

considered, and rejected. It should be noted that the allegations of a defective hatch cover were based on sheer speculation by a naval architect with almost no experience in ocean-going vessels; they were disproven by a surveyor with a background of over 10,000 major ship surveys, worldwide (T.M. 211, 214a-215a).

The trial court held the cause of the sinking to be an excepted error in management (23a-24a), which gave plaintiff the burden of proving that the ship was unseaworthy. 46 U.S.C. § 1304(1); *In re Grace Line Inc.*, No. 84-2657, slip op. at 3601, 3604 (2d Cir. May 19, 1975); *Director General v. S.S. Maru*, 459 F.2d 137 (2d Cir.), cert. denied, 409 U.S. 1115 (1972); *J. Gerber & Co. v. SS. Sabine Howaldt*, 437 F.2d 580, 588 (2d Cir. 1971); G. Gilmore & C. Black, *Law of Admiralty* § 3-43, at 183-85 (2d ed. 1975). And even if the master's error should be regarded as a concurring cause instead of the proximate cause which it was, the court still found that due diligence had been exercised (35a).

Appellant's basic error on this appeal is a belief that fault must be inferred if an excepted cause is not proven. The first eighteen pages of its brief (and many pages thereafter) labor the argument that since the number one hatch failed in expectable weather, it is conclusively proven that the vessel was unseaworthy. Not so. It merely raised a rebuttable presumption that the vessel was unseaworthy. *Caterpillar Overseas, S.A. v. S.S. Expedito*, 318 F.2d 720, 725 (2d Cir. 1963). But the trial court found that the evidence offered by the vessel owner rebutted that presumption.

In any event, appellant's argument misses the real point. This case is governed by the Carriage of Goods by Sea Act, 46 U.S.C.A., 1300 *et seq.* The standard of care required therein is not to provide an absolutely seaworthy vessel, but only to use due diligence to make the vessel seaworthy

at the inception of the voyage. 46 U.S.C.A. § 1304(1) provides in relevant part:

"Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of *due diligence* on the part of the carrier to make the ship seaworthy . . ."

Proof of due diligence rebuts any presumption of unseaworthiness and amounts to a complete defense. Were it otherwise, neither the due diligence defense above quoted, nor the (q) clause of § 1304(2) would have any meaning.

### CONCLUSION

We can hardly improve on the conclusion of the trial judge who heard and observed the witnesses, and who so painstakingly reviewed all the evidence. His conclusion was that the complaint should be dismissed.

"Since the defendant has established that it falls within an exception under Cogsa, 46 U.S.C.A. § 1304(2) (a), since the plaintiff has failed to establish that the ship was unseaworthy, and since in any event the defendant exercised due diligence to provide a seaworthy ship, the complaint is dismissed." (35a)

**The judgment of the court below should be affirmed.**

Respectfully submitted,

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